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MEMORANDUM

TO: Oregon Legislative Joint Interim Committee on State and Private Gambling Regulation

FROM: Craig Dorsay, Siletz Tribal Attorney

SUBJECT: Background and Context Memo on Tribal Gaming Regulation

DATE: July 20, 2022

To the Members of the Oregon Legislative Joint Interim Committee on State and Private Gambling Regulation:

My name is Craig Dorsay. I am the tribal attorney for the Confederated Tribes of Siletz Indians (“Siletz Tribe”) and have served in that capacity since September 1989. I have been involved in the Siletz Tribe’s gaming efforts under the Indian Gaming Regulatory Act (“IGRA”) since the Siletz Tribe first started considering establishing an IGRA gaming operation. The purpose of this memo is to provide the Task Force with a brief legal background of the regulation of Indian gaming – tribal, federal and state.

Legislative consideration of Indian gaming began in the early 1980s after several federal appellate decisions upheld the right of Indian tribes to conduct certain types of gaming free of state regulation. *E.g.*, *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981); *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982). In 1987, the United States Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), confirming the right of Indian tribes to engage in gaming free of state regulation if the State in which the gaming took place regulated rather than prohibited the gaming in question. This legal principle is known as the civil-regulatory vs. criminal-prohibitory principle: if a state regulates rather than completely prohibits a gaming activity, the activity is deemed to be regulated rather than prohibited, even if the regulatory limits are enforced by criminal prohibitions. This principle was reaffirmed by the U.S. Supreme Court as recently as June 15, 2022. *Ysleta del Sur Pueblo v. Texas*, ___ U.S. ___, 2022 WL 2135494.

Tribes essentially withdrew from the Indian gaming federal legislative process after the *Cabazon* decision was handed down because they had won a complete victory in that decision.

The resulting Indian Gaming Regulatory Act was therefore primarily a product of state and federal concerns about unregulated (by the states and federal government) Indian gaming.

IGRA became law on October 17, 1988. 25 U.S.C. §§2701-2721. (Copy attached). It established three classes of Indian gaming: Class I is traditional Indian games, which are regulated exclusively by the tribes; Class II are bingo and games similar to bingo, including electronic, computer or other technological aids to such gaming¹; and Class III gaming, which is every type of gaming that is not Class I or Class II gaming and is essentially casino-style gaming. Class III gaming is the focus of this memo and what all Oregon tribes offer.²

Class III IGRA gaming is addressed at 25 U.S.C. §2710(d). Such gaming requires a “Tribal-State compact” entered into by the tribe and the State. §2710(d)(1)(C). The details of the Tribal-State compact are set out at §2710(d)(3)(C). Compact provisions can include “the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of [tribal gaming] activity,” and “the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations.” §2710(d)(3)(C)(i) and (ii). Subsection (d)(5) preserves concurrent tribal regulation over Class III tribal gaming activity with some limitations: “Nothing in this subsection shall impair the right of an Indian tribe to regulate Class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph 93) that is in effect.”

IGRA also established a federal tribal gaming regulatory agency, the National Indian Gaming Commission (“NIGC”). See 25 U.S.C. §2704 (establishment of NIGC); §2705 (Powers of NIGC Chairman); §2706 (Powers of Commission); §2710(b), (c), and (d) (NIGC authority to review and approve tribal gaming ordinances; approval of tribal gaming licenses); §2711 (NIGC approval authority over management contracts); §2712 (NIGC approval authority over tribal gaming ordinances); §2713 (NIGC authority to impose sanctions and fines against tribal gaming operations); §2715 (NIGC subpoena and deposition authority); §2716 (NIGC investigative powers).

NIGC has enacted extensive regulations implementing its authority. 25 C.F.R. Parts 501 to 575. Copies of relevant sections attached. These include extensive Minimum Internal Control regulations (Part 542).

Each federally-recognized tribe that operates an IGRA authorized gaming operation has entered into a Tribal-State Compact for the Regulation of Class III Gaming with the State of Oregon. Copies of these compacts have been or will be provided to the Legislative Task Force.

¹ It is beyond the scope of this memo, but case law since enactment of IGRA has established that electronic aids to bingo have allowed slot machine type gaming with a bingo format running inside the machine, essentially indistinguishable from regular slot machines.

² Eight tribes in Oregon have Class III casinos. Two tribes have a second casino that are Class II casinos. Those Class II casinos are not subject to State compacts under IGRA.

The Compacts give the State of Oregon and the Oregon State Police extensive regulatory, investigative, and sanction authority over tribal gaming operations. In addition, the Oregon State Police has enacted its own Minimum Internal Controls for tribal gaming operations that are incorporated in each Tribe's compact, either in the body of the Compact or as an Appendix.

Finally, each tribe also extensively regulates its gaming operation(s) under its inherent sovereignty. For the Siletz Tribe, which I represent, the Tribe has enacted a Tribal Gaming Ordinance, at STC §6.001 et seq. The Siletz Tribe has also enacted a Tribal Gaming Enterprise Charter, at STC §6.100 et seq, including establishing the Siletz Tribal Gaming Commission ("STGC") as the independent tribal regulatory authority over the Siletz Tribe's gaming operation. STC §6.105. Copies of Ordinances attached. STGC has enacted its own extensive gaming regulations. Copies of relevant Siletz gaming regulations will be provided by the Siletz Tribal Gaming Commission. These regulations include comprehensive Minimum Internal Gaming Controls.

Tribal gaming in Oregon under IGRA therefore is subject to overlapping federal, state and tribal minimum internal controls. Operatively, whichever internal control is most restrictive on a specific point controls. The OIAGC representative will address the scope and cost of gaming regulation by each government.